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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

NO. 311953

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

CITY OF WENATCHEE, a
municipal corporation,

Appellant,

vs.

CHELAN COUNTY PUBLIC
UTILITY District NO. 1, a municipal
corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The essence of the District's argument is that the governmental immunity doctrine is derived from the Washington Constitution (Article XI, Section 12 and Article VII, Section 9) and requires that authority to impose a municipal tax upon another municipal corporation must be explicitly set forth in state law. This notion is flawed for two fundamental reasons.

First, the purpose of Article XI, Section 12 of the Washington Constitution is to limit the authority of the state to impose local taxes for local purposes, and the purpose of Article VII, Section 9 is to limit tax authority that may be delegated by the state to local governments to taxation for corporate purposes. Thus, the constitutional provisions in question are not a source of limitation upon local tax authority as suggested by the District. Second, the public policy underlying the governmental tax immunity doctrine applies only when the local government or public agency is acting as an agent of the state. The purpose of this doctrine is to protect municipal corporations from taxation that would limit their ability to carry out governmental functions. When a public agency carries out a proprietary function, no public purpose is served by granting immunity from taxation. Further, because only the

state enjoys sovereign immunity, immunity will only apply to activities of a municipal corporation when the municipal corporation is engaged in governmental activities as an agent of the state.

A. Constitutional Limitations.

The District argues that the constitutional provisions in Article XI, Section 12¹ and Article VII, Section 9² have no meaning unless they are interpreted as requiring express authority for a municipality to tax another municipal corporation. Resp't Br. at 3, 7. This argument is contrary to the fundamental purpose of these constitutional provisions which act as a limitation upon state interference with local taxation and as authorization for the state to delegate taxing authority to local governments for corporate purposes.

The purpose of Article XI, Section 12 was recently discussed by the Washington Supreme Court in *Larson v. Seattle Popular Monorail*

¹ SECTION 12 ASSESSMENT AND COLLECTION OF TAXES IN MUNICIPALITIES.

The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

² SECTION 9 SPECIAL ASSESSMENTS OR TAXATION FOR LOCAL IMPROVEMENTS.

The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

Auth., 156 Wn.2d 752, 131 P.3d 892 (2006). The historic underpinnings of Article XI, Section 12 were discussed in a footnote as follows:

The objective of article XI, section 12, frequently called the "home-rule provision," restricting direct legislative action as to local taxing matters, was to bar the state legislators, whose members come from all parts of the state, from dictating local taxing policy and instead to allow municipalities to control local taxation for local purposes. See, e.g., *Schneidmiller & Faires, Inc. v. Farr*, 56 Wn.2d 891, 894-96, 355 P.2d 824 (1960); Alfred Harsch, *The Washington Tax System - How it Grew*, 39 Wash. L. Rev. 944, 950-51 (1964); Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743, 754-55 (1963) . . .

Id. at 757, n.3. Accordingly, the court found that:

Article XI, section 12 clearly establishes that the state legislature may delegate to the corporate authorities of municipalities the power to tax such municipalities, their inhabitants, and property for local purposes. The legislature is expressly prohibited from direct taxation of municipalities and their inhabitants and property for local purposes.

Id. at 758.

It is clear that Article XI, Section 12 was enacted with the purpose of limiting state authority interference with local taxing policy. Accordingly, this provision bars the state legislature from direct taxation upon municipalities for local purposes, but it authorizes the state to

delegate to municipalities the authority to tax municipal corporations for local purposes. In other words, the constitution authorizes the state to delegate to local governments the taxing authority that the state itself is denied. The idea expressed by the District that this constitutional provision serves to limit local taxing authority is thus contrary to the intent of this provision. As explained by the Washington Supreme Court in *State v. Carson*, 6 Wash. 250, 257, 33 P. 428 (1893), in its discussion of Article XI, Section 12:

The power denied to the legislature is the power it is permitted to vest in the corporate authorities. The use of the word “but” after the denial of the power to the legislature requires this construction.

Id. at 257. Because the state itself is denied the authority to tax municipal corporations, it was vested with the authority to delegate this authority to its political subdivisions. The District’s argument that this provision has no meaning other than to restrict local taxing authority is plainly wrong.

The District supports its argument by reference to the long-standing doctrine that municipalities have no inherent taxing authority and that such authority must be expressly granted by the state legislature or the constitution. Resp’t Br. at 3, 7. See *Pacific First Federal Sav. & Loan*

Assoc. v. Pierce County, 27 Wn.2d 347, 352-353, 178 P.2d 351 (1947).³

There is no dispute that this doctrine requires express authority to tax. However, the District suggests that the following language in *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) stands for the proposition that this doctrine also requires that authority to tax a municipal corporation be expressly granted in state law:

The general grant of taxation power on which Algona relies in RCW 35A.11.020 contains no *express* authority to levy a tax on the State or another municipality. To allow the City to impose the tax in this case would violate the established rule that municipalities must have specific legislative authority to levy a particular tax.

Id. at 793. The District has taken the above quote out of context and ignored its limiting language. What the Court was saying was that “in this case”, where governmental immunity applies, a general grant of taxation power contained in state law is inadequate to establish the authority to tax another municipal corporation. The paragraph in the Court’s opinion that follows the preceding paragraph makes this clear:

³ “It is elementary that municipal corporations secure their right, not only to tax, but assess, from express legislative authority, which in turn derives its warrant from our state constitution (*citations omitted*). Municipal authorities cannot exercise powers except those expressly granted, or those necessarily implied from granted powers. . . . Unlike the sovereign state, counties and other municipal subdivisions possess no inherent power of taxation.” *Pacific First Federal savings & Loan v. Pierce County*, 27 Wn.2d at 770 quoting *State ex. rel. Tacoma Sch. Dist. v. Kelly*, 176 Wash 689, 690, 30 P.2d 638 (1934).

The governmental immunity doctrine provides that one municipality may not impose a tax on another without express statutory authorization. (*Citations omitted*). The majority of jurisdictions adhere to this rule on the theory that a local tax imposed on a political subdivision such as a county is tantamount to a tax imposed on the State. (*Citations omitted*).

Id. at 793-794. Thus, when the Court states in the preceding paragraph that to allow the City “in this case” to impose the tax would violate the general rule, the Court is simply saying that in a case where the governmental tax immunity doctrine is applicable, specific authority must be expressed in state law authorizing a tax upon another municipal corporation. This conclusion is supported by the fact that none of the cases cited by the *Algonia* Court or the District require explicit authority to tax another municipal corporation.

Article VII, Section 9 is likewise not a source of a direct limitation upon local government tax authority. As stated by the Washington Supreme Court, “The constitution itself does not grant taxing power, but, by Article VII, Section 9, the legislature is authorized to vest municipal corporations with this power.” *Pacific First Federal Savings & Loan Ass’n v. Pierce County*, 27 Wn.2d 347, 353, 178 P.2d 351 (1947). More importantly, this constitutional provision is a source of limitation upon the taxing authority that may be delegated by the state because it limited such

delegation to taxation only for corporate purposes. *Weyerhaeuser Timber Co. v. Roessler*, 2 Wn.2d 304, 308, 97 P.2d 1070 (1940). Thus, Article VII, Section 9 serves as a limitation upon the taxing authority that may be delegated by the state to local governments and is not a direct source of limitation upon local taxing authority.

The Court's decision in *Algona, supra*, is indirectly implicated in *Burba v. Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989). In *Burba*, the Court held that it was constitutionally permissible for the City of Vancouver to increase rates to customers outside of the city to pay for the costs of a municipal utility tax upon the city utility. Thus, the Court upheld the constitutional validity of the utility tax upon water and sewer utility revenues. *Id.*

The District essentially argues that, absent specific statutory authority to tax a municipal corporation, the state constitution requires that all municipal utility revenues are immune from taxation. Resp't Br. at 7, 12. If this were indeed the holding of the Supreme Court in *Algona*, then the Supreme Court in *Burba* could not have upheld the Vancouver utility tax. It would have been bound by *Algona* and would have invalidated the Vancouver utility tax because the City lacked specific authority to impose a utility tax upon its own municipal utility revenues. The fact is that this issue was never addressed by the Court in *Burba* because the exemption

from taxation is only applicable when the governmental tax immunity doctrine applies. Governmental immunity was inapplicable in *Burba* because this doctrine is a shield from taxation by other municipalities and arguably has no application when a municipality taxes itself. Thus, *Burba, supra*, is supportive of the City's arguments that governmental immunity applies only when the utility is acting in a governmental capacity. In such circumstances, the utility is immune from taxation absent specific waiver of such immunity.

B. Governmental Tax Immunity.

The District argues that the governmental tax immunity doctrine applies to all municipal taxes imposed upon municipal corporations regardless of the activity the taxpayer is engaged in. Resp't Br. at 7, 12. This argument ignores the public policy interests upon which this doctrine is based.

The governmental tax immunity doctrine is based upon notions of sovereign immunity. *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984). The general limitations upon the governmental tax immunity doctrine are discussed in the following passage from McQuillin on Municipal Corporations:

The general rule is that an exemption or immunity of municipal property from taxation is limited to property actually

devoted to public use, or to some purpose or function of government. Two classes of property are included, first, property held for a public use, e.g., municipal buildings, wharves, bridges, property devoted to slum clearance projects, and gravel pits. Secondly, property held for public use for the benefit of the people for their free use and enjoyment, e.g., parks, public squares, parking lots, swimming pools, golf courses, ferries, liquor dispensaries, and airports. But it is generally conceded that a city which enters the field of private competitive business for profit divests itself of its sovereignty pro tanto and forfeits its immunity from taxation.

In some states, property purchased by a city at a tax sale and held solely for resale is taxable, but in other jurisdictions it is not.

On the other hand, while there is authority to the contrary, it is generally held that, except where there is an express statutory exemption, property of a municipality is subject to taxation if it is not devoted to public use but is held for revenue or like purposes, or for possible future public use, or if it is held by a city acting in its proprietary, as distinguished from its governmental, capacity. The position has been taken, however, that the mere fact that some revenue is incidentally derived from public property primarily and principally devoted to a public use does not in and of itself alter the character of the holding as one for a public purpose within the meaning of an exemption from taxation.

16 McQuillin Mun. Corp. § 44.59 (3d ed. 2012). Washington Courts have consistently found that when a municipal corporation acts in a proprietary capacity, sovereign immunity is inapplicable. This is explained by the Washington Supreme Court in its discussion of tort immunity:

Municipal corporations enjoy their immunity from liability for torts only in so far as they partake of the state's immunity, and only in the exercise of those governmental powers and duties imposed upon them as representing the state. In the exercise of those administrative powers conferred upon, or permitted to them solely for their own benefit in their corporate capacity, whether performed for gain or not, and whether of the nature of a business enterprise or not, they are neither sovereign nor immune. **They are only sovereign and only immune in so far as they represent the state. They have no sovereignty of their own, they are in no sense sovereign per se. Their immunity, like their sovereignty, is in a sense borrowed, and the one is commensurate with the other.** Such is, in effect, the conclusion reached in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, after a most exhaustive review of the authorities, both American and English. The same principle underlies our own decisions. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895; *Cunningham v. Seattle*, 42 Wash. 134, 84 Pac. 641; *Linne v. Bredes*, 43 Wash. 540, 86 Pac. 858, 117 Am. St. 1068, 6 L. R. A. (N.S.) 707. (emphasis added).

Hutton v. Martin, 41 Wn.2d 780, 784, 252 P.2d 581 (1953) quoting *Riddoch v. State*, 68 Wash. 329, 123 P. 450 (1912); see also, *Wilson v. Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993) (the immunity of a municipality, however, derives solely from the state as sovereign); and, *Kelso v. Tacoma*, 63 Wn.2d 913, 916, 390 P.2d 2 (1964) (the common-law right of sovereign immunity is not in the municipality but in the sovereign from which the immunity is derived). Although *Hutton, supra*, involves immunity from tort liability, the concept of sovereign immunity as an attribute of state action is not limited to tort immunity. See e.g. *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) (analyzing the constitutionality of a municipality's tax on public water utility); *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (discussing imposition of tax in context of sovereign immunity as to the provision of streetlights). The principles underlying sovereign immunity described here are equally applicable to immunity from taxation.

When the municipal corporation acts on behalf of the state in performing governmental functions, it is cloaked with the sovereign immunity of the state. *Hutton, supra*. However, when a municipal corporation is not acting as a representative or agent of the state, immunity cannot apply because political subdivisions have no sovereignty of their

own and thus cannot enjoy immunity when not acting in a governmental capacity. *Id.* The District's argument that the tort immunity cases have no application here overlooks the fact that municipal corporations are not sovereign entities. Thus, municipal immunity will always depend upon the municipal corporation's status as an agent of the state. When it does not act as a state agent, such as when it engages in proprietary activities, it cannot be protected by the state's sovereign immunity. Thus, the District's claim that immunity applies regardless of the activity engaged in by the taxpayer is wholly contrary to the established law in Washington.

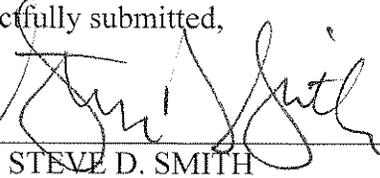
II. CONCLUSION

The distinction between governmental acts inhering in the sovereign and governmental acts of a proprietary nature is a key component in determining whether the District is immune from the tax imposed by the City. The governmental immunity doctrine is based on notions of sovereign immunity which applies only when a municipal corporation acts on behalf of the state and in a governmental capacity. The District is not acting as an agent of the state when it sells domestic water to paying customers. Thus, governmental immunity does not apply to protect the District from the tax levied by the City.

DATED: January 17, 2013.

Respectfully submitted,

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COURT OF APPEALS
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

CITY OF WENATCHEE, a municipal corporation,)	
)	NO. 311953
Appellant,)	DECLARATION OF SERVICE
)	
vs.)	
)	
CHELAN COUNTY PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation,)	
)	
Respondent.)	
)	
)	

I, Barbara A. Coffin, under penalty of perjury under the laws of the state of Washington, declare as follows:

I am a legal assistant at Johnson, Gaukroger, Smith & Marchant, P.S., attorneys for City of Wenatchee, Appellant herein. On the 18th day of January, 2013, and in the manner indicated below, I caused a copy of the Appellant's Reply Brief to be served on:

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3 P.O. Box 1231
4 Wenatchee, WA 98807-1231

5 By United States Mail, postage prepaid
6 By Legal Messenger
7 By Facsimile
8 By UPS Next Day Air

9 DATED this 17th day of January, 2013, at Wenatchee, Washington

10 

11 BARBARA A. COFFIN

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23 DECLARATION OF SERVICE

24 Page 2 of 2

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